

Highland Nursing Home and Warehouse, Mail Order, Office, Technical and Professional Employees Union, Local 743, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 13-CA-20838

July 23, 1981

DECISION AND ORDER

Upon a charge filed on February 17, 1981, by Warehouse, Mail Order, Office, Technical and Professional Employees Union, Local 743, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, and duly served on Highland Nursing Home, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 13, issued a complaint on March 17, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and the complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on September 2, 1980, following a Board election in Case 13-RC-15460, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;¹ and that, commencing on or about October 18, 1980, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On April 9, 1981, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On May 12, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on May 18, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent

thereafter filed a response to the Notice To Show Cause entitled "Memorandum in Opposition to Motion for Summary Judgment."

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the Notice To Show Cause Respondent repeats its contention, first raised in the representation proceeding, that the Regional Director's refusal to consider its untimely filed objections to the election was unreasonable. While not disputing that its objections had been untimely filed, Respondent argues that, since the Regional Director had not yet closed his post-election investigation when the objections were received, the Regional Director should have considered them.

The General Counsel argues that all material issues have been previously presented to, and decided by, the Board and that there are no litigable issues of fact requiring a hearing. We agree with the General Counsel.

Our review of the record herein, including the record in Case 13-RC-15460, discloses that the Regional Director for Region 13 approved a Stipulation for Certification Upon Consent Election on May 9, 1980. Pursuant to that stipulation an election was conducted on May 30, 1980. The tally of ballots showed four votes cast for, and none against, the Union, with four challenged ballots. The Union filed timely objections to conduct affecting the results of the election. Respondent filed untimely objections to the election. On June 27, 1980, the Regional Director for Region 13 issued a report on challenged ballots and objections in which he overruled Respondent's objections as untimely, sustained one challenged ballot, and, since the remaining ballots were no longer determinative, found it unnecessary to pass on the Union's objections. The Regional Director recommended that the Union be certified as the collective-bargaining representative of the unit stipulated as appropriate.

Respondent filed timely exceptions to the Regional Director's report. The Board, on September 2, 1980, issued a Decision and Certification of Representative adopting the Regional Director's findings and recommendations and certifying the Union as the exclusive bargaining representative of all employees in the stipulated appropriate unit.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled

¹ Official notice is taken of the record in the representation proceeding, Case 13-RC-15460, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

to relitigate issues which were or could have been litigated in a prior representation proceeding.²

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is now, and has been at all times material herein, an Indiana corporation engaged in the health care business of operating a nursing home. During the past calendar year, a representative period, Respondent received gross revenues in excess of \$100,000. Respondent also purchased and received goods and materials valued in excess of \$5,000 directly from points outside the State of Indiana.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Warehouse, Mail Order, Office, Technical and Professional Employees Union, Local 743, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

All full-time and regular part-time employees including assistant charge aides, nurse's aides, cooks, housekeepers and launderers employed at the Employer's facility now located at 9630 Fifth Street, Highland, Indiana; but excluding registered nurses, licensed practical nurses, charge aide-second shift, charge aide-third shift, activity and social director, food service supervisor, relief health services supervisor, office clerical employees, guards and supervisors as defined in the Act.

2. The certification

On May 30, 1980, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 13, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on September 2, 1980, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about October 17, 1980, and at all times thereafter, and again on January 5, 1981, and continuing to date, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about October 18, 1980, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since October 18, 1980, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and ob-

² See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

structing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enf'd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enf'd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Highland Nursing Home is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Warehouse, Mail Order, Office, Technical and Professional Employees Union, Local 743, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time employees including assistant charge aides, nurse's aides, cooks, housekeepers, and launderers employed at the Employer's facility now located at 9630 Fifth Street, Highland, Indiana, but excluding registered nurses, licensed practical nurses, charge aide-second shift, charge aide-third shift, activity and social director, food service supervisor, relief health services supervisor, office clerical employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since September 2, 1980, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collec-

tive bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about October 18, 1980, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Highland Nursing Home, Highland, Indiana, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Warehouse, Mail Order, Office, Technical and Professional Employees Union, Local 743, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive bargaining representative of its employees in the following appropriate unit:

All full-time and regular part-time employees including assistant charge aides, nurse's aide, cooks, housekeepers and launderers employed at the Employer's facility now located at 9630 Fifth Street, Highland, Indiana; but excluding registered nurses, licensed practical nurses, charge aide-second shift, charge aide-third shift, activity and social director, food service supervisor, relief health services supervisor, office clerical employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its 9630 Fifth Avenue, Highland, Indiana, facility copies of the attached notice marked "Appendix."³ Copies of said notice, on forms provided by the Regional Director for Region 13, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 13, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

³ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Warehouse, Mail Order, Office, Technical and Professional Employees Union, Local 743, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All full-time and regular part-time employees including assistant charge aides, nurse's aides, cooks, housekeepers and launderers employed at our facility now located at 9630 Fifth Street, Highland, Indiana; but excluding registered nurses, licensed practical nurses, charge aide-second shift, charge aide-third shift, activity and social director, food service supervisor, relief health services supervisor, office clerical employees, guards and supervisors as defined in the Act.

HIGHLAND NURSING HOME